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An alarming aspect of the dramatic change in the relationship between a university and its constituents is the increasing number of court cases challenging traditionally academic decisions. The filing of these cases seems to suggest that judicial processes can be substituted for academic ones. Although many courts have recognized the distinctive nature of the academic community, the danger of shifting final decision making from campus to court remains. The great influx of public funds, the view of education as a social necessity, the strong egalitarian drive, the expansion of civil rights protection, the erosion of disciplinary supervision by home, school or college have made academic decisions vulnerable to judicial review. The university can benefit from measuring its private rules against public canons of due process, but examination differs from actual substitution of the courts. By abandoning disciplinary responsibilities, the university may be sacrificing rights to make qualitative judgements about human talent and to protect academic freedom through institutional autonomy. To prevent judicial instrusions, the purposes and values of the academic community must be clearly defined and the forces of public interest, social criticism, concern for human quality and aspiration brought into balance. Members of the academic community must make the effort required to sustain it. (JS)

THE UNIVERSITY AND DUE PROCESS

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The University and Due Process

SEVENTY-SIX YEARS AGO, in a decision handed down by the Illinois Supreme Court, the dismissal of a student from the state university was upheld on the grounds that by voluntarily entering the university he "necessarily surrenders very many of his individual rights." The opinion went on to say that in the way a student spends his time, behaves himself, chooses his recreation and the places he visits, "in all these matters, and many others, he must yield obedience to those who, for the time being, are his masters. . . ."

Today, in 1967, such an opinion would probably be laughed out of court. If it were taken seriously, it would touch off the campus uproar of the century. A reception for the Dow Company, the U.S. Army, and Dean Rusk all rolled into one would be the model of mild-mannered decorum compared to the treatment that would be accorded the poor, outdated judge who wrote that 1891 opinion.

For that judge would discover that a Copernican revolution had taken place. When he prepared his decision, the student considered himself a student first and a citizen second. Now he would find that it is the other way around: the student is a citizen who happens also to be a student. The judge would discover, as well, that the faculty had become professionals first and resident teachers second. Like Rip Van Winkle, the good judge would wake up to an academic community that had changed some fundamental priorities.

Few subjects mark so dramatically the change that has taken place in American higher education in the last half-century as the whole relationship between the institution and its constituents. None of us, least of all the faculty and administration, much mourns the demise of the tradition of *in loco parentis*. But we do view with some alarm the specter that seems to be rising out of its ashes and taking the form of a rash of court cases challenging decisions in areas that were once considered the educational world's peculiar province. The filing of these cases seems to suggest that judicial processes can be substituted for academic processes. It is a comparison that is being tested with explosive results on such prestigious campuses as Wisconsin, Berkeley, and elsewhere as well.

Let me cite a few cases to illustrate the point.

Last March, a student at the U.S. Merchant Marine Academy was disciplined for taking part in and perhaps leading what the court referred to as "an unauthorized mass movement" to pitch a cadet regimental officer into Long Island Sound. The student accumulated enough demerits for this caper to be himself pitched out of the Academy. He sued in the courts on the grounds that both the Academy's rules and the procedures for their enforcement violated his constitutional rights of due process. His appeal was turned down, not because the court didn't think the Academy's procedures were subject to judicial review, but because the plaintiff hadn't made a good enough case against them. The court specifically reserved the right to review the facts in another case like it to see if due process might be violated.

Another suit, heard in Iowa, challenged the right of state universities to impose higher tuition rates on out-of-state students. The basis of this case is that discrimination between residents and nonresidents threatens to deprive nonresident students of the equal protection of the law.

In a third suit, one with which many of you are familiar, Parsons College tried to bring the North Central Association of Colleges and Secondary Schools into court to force reinstatement of the college's accreditation. Although the judge denied the suit, the college, at least for a time, held seriously the idea that the basis for accreditation could be subject to judicial review.

In a bizarre case even closer to the academic heartland, a legal scholar sued the *Rutgers Law Review* for rejecting an article he had submitted for publication. His position was that the student editors had been so indoctrinated by the law school faculty that they were unable to view his article objectively; by refusing to print it, he contended, they violated his right of free speech under the First Amendment. The court rejected his argument and the suit. But the fact that it was brought to legal test at all, and that it represented a challenge to one of the most fundamental bases of academic freedom—the right to make qualitative, intellectual judgments without fear of civil interference—makes this case a potentially significant one for the future of the academic community.

There are other instances. Parents threaten to sue admissions officers for not allowing their children equal time in interviews or for employing discriminatory criteria for admission. Teachers seek

judicial review of hiring and promotion procedures. In the classic educational case of our time, the desegregation decision of 1954, the Supreme Court was asked to pass judgment upon the very quality of education itself. Perhaps the time is not far off when the granting of diplomas and degrees, the marking of papers and awarding of grades, indeed, almost every aspect of academic affairs will be open to legal challenge and the requirement to conform to judicial standards.

It is comforting to note, however, that the courts have taken some pains to recognize the distinctive features of the academic community. While asserting the right of judicial review to protect the student as citizen, the courts have not lost sight of the need for special institutional flexibility arising from the fact that the student is a student. This attitude was most sensitively stated in the case of *Goldberg vs. the Regents of the University of California*, brought by students involved in the so-called "filthy speech" movement. The court noted:

> Historically, the academic community has been unique in having its own standards, rewards, and punishments. Its members have been allowed to go about their business of teaching and learning largely free of outside interference. To compel such a community to recognize and enforce precisely the same standards and penalties that prevail in the broader social community would serve neither the special needs and interests of educational institutions, nor the ultimate advantages that society derives therefrom. Thus, in an academic community, greater freedoms and greater restrictions may prevail than in society at large, and the subtle fixing of these limits should, in large measure, be left to the educational institution itself.

But the danger of shifting the ultimate decision-making from campus to court has not been removed. The right of review has been established; the student as citizen first is increasingly the current stance; eager lawyers are available to lead the student into court; and permission given to the institution for the "subtle fixing of the limits" is with equal subtlety accompanied by the requirement that the academy prove its innocence.

As William Van Alstyne has pointed out, "A university rule which threatens a student with dismissal for any activity he is constitutionally entitled to pursue as a citizen carries the burden of estab-

lishing precisely how that activity would especially interfere with the legitimate business of the university."

The change is already beginning to show up in dramatic fashion. At Berkeley and Wisconsin the communities are subject to the scissor effect of student protest and a spate of court injunctions. A growing number of cases are being decided in favor of the student. The U.S. National Student Association and the American Civil Liberties Union are vying with each other to round up additional legal talent. It is this prospect that has made General Hershey's ill-advised dictum so dangerous. It has given one more occasion for interference with the capacity of the university to function as a self-contained community. The prospects are not pleasant to contemplate.

Before we examine the consequences of this development on the nature of academia, it is only fair to ask how it has come to be that once-inviolate academic decisions are now so vulnerable to judicial review.

There are several causes. Certainly the ubiquitous financial support of the Federal and state governments is one. There is hardly a level of instruction and hardly any educational institution that Federal money does not touch somehow. With public support comes the inevitable public scrutiny, not simply of how the money is spent, but of how well the product turns out. Arbitrary actions by both public and private institutions that in any way hamper the fullest development of our manpower resources are bound to raise questions about proper conformity to the public interest. And the courts have traditionally been one place where adjustments of public policy and private interests are made.

As education comes to be regarded more and more as both a social necessity and an individual right, the emphasis moves increasingly from the institution to the individual. Because the institution is the instrument of what is now a crucial public purpose, institutional performance is being subjected to new standards established outside the academic world. If the institution somehow fails the individual, public outcry is much more likely to arise on the side of the student than on the side of the institution, and in the ensuing debate public rather than institutional standards are inclined to prevail.

A second reason for the growing involvement of the courts in

academic matters is the strong egalitarian drive for higher education in the years since the war. No longer a status symbol of the privileged classes, higher education is being carried along in the strong undertow of society's steady movement, posited by political philosophers since Sir Henry Maine, from status to contract. Our social order is based on the free agreement of individuals; our rules receive their legitimacy by consent rather than by authority. But equality means equality of treatment, and the assurance of equality of treatment leads us once again to a consideration of academic procedures.

And here we are up against the whole complex activity of judging human performance. What is equal treatment in education? Is it offering equal opportunity? Is it giving all students equal time? Are all students to be regarded as equal? Surely abilities differ. Before the academic bar, all students are *not* equal. Five minutes with a bright student may be equal to an hour with a slow one. Offering advanced calculus to one student may be the equivalent in opportunity of offering reading to another. Further, who is to be permitted to judge individual abilities, and who should assess academic performance and progress?

The academy is in the business of making discriminating judgments about human talent and then providing for differential performance. But it is precisely this differential treatment that runs afoul of the strong egalitarianism of current social doctrine. Thus the review of academic procedures by judicial procedure, based on different postulates, presents many difficulties for the academy. I shall take them up later in these remarks.

There is a third strain running through our society now that must be taken into account. This is the expansion of civil rights protection by public authority. Such protection has been a hallmark of the Warren Court. It has reached into all kinds of decisions once considered purely private, and there may be no stopping point. The courts will protect an individual from discrimination in housing, in job opportunity, in access to public facilities, whether the discrimination is based on race, color, creed, national origin, youth, age, or sex. At what point, then, can an educational institution, public or private, expect its own discrimination to remain immune? Admissions practices (all universities and colleges make a conscious attempt to design freshman classes so that they will contain an appropriate mixture of students), scholarship awards, parietal rules, the

designation of holidays, the banning of beards and miniskirts, all in one way or another may prove to violate individual civil rights.

Finally, there is the erosion in disciplinary supervision of the young by the family, school, and college. As a result, there is not only far wider freedom for this generation than any other in recent memory, but also a recognition that the young are both a political and economic force to be reckoned with, if not catered to as well. It is increasingly anachronistic for any institution of higher education to expect to play a traditional parental role toward its students, undergraduate and graduate alike—particularly when the real parental role today is anything but traditional.

The more students welcome this independence, however, and, as the recent moves of the National Student Association indicate, the more willing they are to test their independence in the courts and the more they are inclined to question the basis of the rules enforced against them. The educational institution—and particularly the university—is then faced with the task of bringing civil and academic procedures into some sensible and humane focus. Cornell's recent Sindler Report is a careful attempt to do just that. But it has taken an enormous amount of faculty work and time, and we are not out of the woods with it yet.

Now, where does all this leave us? Obviously, the university is something more than an intellectual department store, whose only disciplinary role is to prosecute petty larceny in the library and occasional cheating on the final exams. But what more is it? And what must it do to be saved from a lifetime on the witness stand?

Let us admit at the outset that not all consequences of judicial review will be harmful to the academic world. Arbitrariness is not unknown in the most elite intellectual circles. Administrators are not uniformly capable of distinguishing between what they consider desirable and what is acceptable to a consensus of the community. Operating under pressure, as administrators do much of the time, they can be insensitive to the most rudimentary forms of justice and fair play. Some faculty members are not immune to the temptation of playing favorites. And some students have been known to trample heedlessly on the rights of others in pursuit of objectives that seem important to them.

Of all our democratic institutions, the academy should be the most sensitive to the rights of the individual and to the importance of safeguarding them in a large and complex society. There is, therefore, much to be gained by the academic community in measuring its own private code against the public canons of due process. All of us—administrators, faculty, and students alike—ought to know how far and in what ways academic life falls short of the standards of fair play that have been evolved by legislature and court. And when the academy's procedures for dealing with its internal problems have either been exhausted or have so patently failed the community that there is no other recourse, then we must be prepared, like other institutions and citizens of this land, to bring our difficulties to the courts for adjudication.

But examination of an academic institution's rules in the light of civil due process is quite different from actually substituting the courts for the academic community in the administration of justice—or even taking our internal disputes to court except as a last resort. The academic community as an educated and presumably civilized body of men and women ought to be able to work out a modus vivendi that will free them from the fear of daily encounters with the summons server. Before the academic community abandons its responsibilities here and turns all the difficult disciplinary decisions over to the courts, it would do well to consider just what it is gaining and what it is giving up.

There are two major problems that the substitution of civil for academic rule presents to the academic community. One is the prospect that the academic institution will be prevented from making qualitative decisions about human talent. The other is that the institution's ability to protect academic freedom may be sacrificed.

It is surely one of the important functions of the educational world, from primary school through graduate school, to sort out the human talent that pours in endless stream through its system. This sorting process involves a continuous matching of institution and program, on the one hand, with individual aspiration and capability, on the other. The whole paraphernalia of admissions, guidance, testing, grading, and counseling is designed to make sure that the individual student has the maximum chance both to discover and to develop his talents.

Qualitative decisions are the essence of academic life. To re-

place this kind of decision with either civil laws that must not distinguish between the plumber and the philosopher, or with the kind of wrangling over technicalities to which court action can so easily degenerate, would do permanent damage not only to the sensitive academic processes for judging quality, but indeed to quality itself.

Even more fundamental is the damage that constant legal interference can do to institutional autonomy. Institutional autonomy is the surest guardian of academic freedom. To shift from the rules and procedures that academic institutions have evolved as central to the teaching-learning process and to put academic discipline, appointment, grading, and all manner of educational requirement at the mercy of the courts would mean, quite simply, that civil jurisdiction over intellectual inquiry would be complete. If students think the educational establishment is cautious, conservative, and bureaucratic now, they haven't seen anything compared to what it could be if every move and every conversation were liable to replay in the courtroom.

We should not fail to note that there are other problems, too, if resort to legal action becomes a campus routine. There are human rights involved in the time and cost of adjudication. Our judicial system is already overloaded. For every hour that might be spent ironing out conflicts on the campus itself, plaintiffs can wait months and sometimes years for action in the courts. Meanwhile, academic careers and perhaps the institution, too, can be ground to a standstill. The costs of legal procedures can be a nightmare for both the individual and the institution. The ACLU budget may not be unlimited. Further, there is the damage to the student-teacher relationship. If student and teacher must constantly face the prospect of having to testify against each other, as someone pointed out lately, the spark between them dies very quickly.

We cannot let any of this happen. The power to prevent what could easily be the dissolution of all that makes the academy both valuable and unique is still in the hands of the academic community. If this power is to stay there, and if this community takes its independence seriously, then every one of its members must bend their energies to keeping the academy intact and preserving its ability to manage its own affairs. At the root of these court cases now upon us is a profound malaise about the direction and purpose of university, multiversity, and indeed the whole educational struc-

ture. The courts are simply moving into a vacuum left by a dispersed and weakened community.

The first and most important thing we must do is to make sure we understand quite clearly what the academic community is, what its purposes and values are, how it differs from the society around it, and why it should differ. If there is confusion about these matters in the public mind, it is primarily because the academic world itself is confused about them.

Any attempt to define the academic community, it seems to me, must begin with its social context. The educational enterprise in this country grows primarily from society's undeniable need for well-trained men and women. This need must, in some measure, be reflected in the activities of every educational institution. The pressure for universal education has come from society and not from our schools and colleges. The educational system has responded to the deep egalitarian strain in our democratic values and to the demand of modern society for trained manpower.

The same is true in other countries. The great impulse to educational reform comes from the pressures of societies that are moving from a traditional to a modern mode. In Chile, it is the social requirements felt by President Frei that are bringing pressure on the University of Santiago to strengthen its work in the social sciences, agricultural technology, and urban and rural reform. It is the needs of the new Ghana that are giving the university's vice-chancellor, Alex Kwapong, his franchise to modernize the curriculum there. It is the desperate shortage of the many skills required by both government and industry in England that presses for the expansion of university education in that country. And we cannot forget that in America the Land-Grant College Act of 1863 was a direct response to our needs for better training in agriculture and technology.

So no sensible observer can ignore the fact that one of the great impulses for educational reform has been society and its conception of its needs. Nor can we deny that this impulse has shaken up the educational establishment, produced overdue educational reform, and given education new objectives. The connection between social purpose and educational performance, therefore, is close and dynamic.

But society's pressure for education is not the only force to which the academy must respond. If the educational establishment were

nothing more than an arm of society, doing society's bidding at every turn and simply pumping up trained manpower to fuel the *status quo*, the case for academic autonomy would disappear and the case for civil rule, with all its laws and political procedures, is complete.

A second force enters the picture: the academic community's own need—in fact, obligation—to concern itself with social quality, social criticism, and social reform, and to pursue the truth wherever it may lead. It is here that the need for independence from civil pressures is the most crucial. The academic community must provide a harbor to those who would form an objective view of society, with all its faults and virtues, and work to produce the new men and new ideas for a better world. This community must be free to experiment, to express unpopular and unorthodox views, to argue, and to dissent.

And whether or not social utility is the proximate purpose of those who pursue knowledge, the search for truth must be viewed as having a positive long-range effect on human understanding and human life. That search for truth, free and unfettered, must be protected with all our might.

There is a third force shaping the work of the academic community. That is the demand of those who enter the educational system to seek their own self-development. It is not enough that society's needs, the search for truth, and the concern for social improvement determine the content and the values of academic life. Hardly a student passes through our schools and colleges who hasn't his unique expectations for self-discovery and fulfillment. These expectations may not always coincide with programs designed to meet social needs or with activities organized by a faculty in pursuit of the truth. The multiversity may seem deaf to such individual needs.

But these individual aspirations must be met, or our academic society will become as dehumanized and impersonal as our worst fears portend. And these aspirations must be met not simply by a curriculum that contains subject matter on students' minds, nor even by research that teachers and professors may sometimes share with their students. Nothing short of redesigning the environment of the academy itself will begin to answer the needs of students who must learn the difficult business of becoming effective adults.

It is the unique task of the academic institution to bring into balance all these forces—public interest, social criticism, and the concern for human quality and individual aspiration. It is a task that requires the utmost flexibility and understanding. Its demands are unremitting on the thousand decisions, large and small, that must keep these forces in some kind of balance. Not all the courts in the country, working full time on academic problems, could ever construct the peculiar environment in which a well-balanced learning community can either function or flourish.

All this requires sensitive guidelines for our legislative and judicial systems. Both must exercise wise restraint in applying constitutional protection to the details of academic affairs. It is interesting to note that the courts have devised quite elaborate procedures to protect their own freedom to arrive at independent judgments without undue interference. Perhaps that is one reason why the courts, in asserting their power to protect the constitutional rights of members of the academic community, have in the past understood that this community is something special and might be easily wrecked if the law were insensitively applied. The courts should also recognize that if the locus of power over academic decisions moves from the academy to the courts, they will be the focus of public attention. For as soon as the interested public discovers where the power is, that is where it will apply the pressure.

But the continued appreciation of the courts for the uniqueness of the academic community rests on both "uniqueness" and "community." If the university or the school acts like a department store, it will surely be treated like one. In the end, it is up to the faculty, students, and administration to demonstrate that they do indeed constitute a community, capable of developing and living by a code that is fair to all its members and unique to its special requirements.

Today the idea of academic community is in trouble. The faculty are torn between the local responsibility of campus and the national responsibility of profession. The students have freed themselves from the strict parietal rules of the past but are groping for a new integration into the academic community. And the administration is distracted by the pressures for coordination with other institutions and by the evolving relations with government. We are all paying the price.

If we are not to be legislated into total paralysis, there is nothing for it but that each of us goes to work to put the pieces of the community together again. Students and administrators will have to stop regarding each other as implacable enemies. For students this will mean a recognition that they can't have it both ways: they can't ask for full participation in a community that they are systematically proceeding to destroy. And before students leap too quickly into the arms of civil law, they should be reminded that they will have to live with all the law, not just the parts they like. In such quasi-political matters as the draft, pornography, and discrimination, students may be subject to laws they don't like at all. He who appeals to the law for protection must be prepared to obey it.

For administrators it will mean a very hard look at all the rules and procedures by which their institutions live; quite possibly, it will also mean limbering up some very stiff attitudes about the role of students in academic affairs. And for faculty it will mean not only that they take the time to act as arbiters and to provide the balancing force, but that they reorder their work and give campus affairs a higher priority. A community of any kind is strong only to the extent that its members make the effort required to sustain and nourish it. We must all be willing to make the effort.

Toward the end of the Second World War, Judge Learned Hand gave a talk in New York's Central Park so widely quoted at the time that it has only barely escaped becoming a part of the national consciousness. I dare to quote it again because it is incontrovertibly applicable to the plight of our own time and because the evidence before us suggests that few of us remember what so stirred us little more than twenty years ago.

> I often wonder [he said] whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it. And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognize no check upon

their freedom soon becomes a society where freedom is the possession of only a savage few; as we have learned to our sorrow.

Law courts are a last resort, to be used only when human relations fail. If education is to be regarded as a necessary means to a civilized society, the academic community must lead the way by conducting itself with civility and learn again to be in truth a community.